IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

LETTERS PATENT APPEAL No 1745 of 1999
in
SPECIAL CIVIL APPLICATION No 5623 of 1999

For Approval and Signature:

Hon'ble MR.JUSTICE KSHITIJ R.VYAS
and
Hon'ble MR.JUSTICE M.S.SHAH

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

SHAH PRADEEPKUMAR RAMANLAL

Versus

MANAGING TRUSTEE - PRINCIPAL

Appearance:

1. LETTERS PATENT APPEAL No. 1745 of 1999

MR PK JANI for Appellant.

Ms SEJAL SUTHARIA for MR VH DESAI for Resp.No. 1

MR PREMAL JOSHI, AGP for Respondent No. 2-4

CORAM : MR.JUSTICE KSHITIJ R.VYAS
and
MR.JUSTICE M.S.SHAH

Date of decision: 02/07/2003

ORAL JUDGEMENT

(Per : MR.JUSTICE M.S.SHAH)

This appeal under Clause 15 of the Letters patent is directed against the judgment and order dated 4.11.1999 passed by the learned Single Judge whereby the petition filed by the appellant herein for challenging the order dated 16.6.1998 passed by the Gujarat State Higher Secondary Education Tribunal in Application Nos. 240 of 1994 and 21 of 1997 came to be dismissed. In the said petition, the appellant had also prayed for a direction to the Commissioner of Higher Education to declare the appellant as a surplus teacher and to extend to the appellant all the benefits of such protection.

2. The facts leading to filing of this appeal are as under :-

2.1 The appellant was appointed as an assistant teacher in respondent No.1-school in its vocational stream classes on 12.9.1988. It appears that some disputes arose between the appellant and the school management since 1991 which resulted into the appellant being shown as absent from the school from 1.8.1991 onwards. While the appellant admitted his absence from the school for the period from August, 1991 to 25.2.1992 for which he expressed his regrets, there was serious dispute as to what transpired on and after 26.2.1992. According to the appellant, he reported for resuming duty on 26.2.1992, but the school management did not permit the appellant to resume duty. On the other hand, the case of the school management was that the appellant had not reported for resuming duty even after 26.2.1992. The appellant, therefore, made representations before the District Education Officer and when the appellant was not permitted to resume duty, the appellant ultimately approached this Court on 25.2.1993 by filing Special Civil Application No. 1535 of 1993. When the said petition reached hearing on 3.5.1994, this Court disposed of the petition relegating the appellant to the alternative remedy before the Gujarat State Higher Secondary Education Tribunal on the ground that several disputed questions of fact were involved. This Court also noted that in the meantime in the year 1993, the proceedings were also pending for getting the appellant declared as a surplus teacher and that since the appellant's claim for being declared as a surplus teacher was not granted, this question shall also be required to be gone into by the Tribunal.

2.2 Accordingly, the appellant approached the Tribunal by filing Application No. 240 of 1994. When that application reached hearing before the Tribunal, after hearing the parties, the Tribunal noted the rival versions, that is, the case of the appellant that he was not permitted to resume duty and the case of the school management that the appellant himself was remaining absent. After recording the rival versions, the Tribunal, in its interim order dated 23.7.1996 (Annexure "D" to the petition), observed as under :-

> "It is, however, undisputed fact that the services of the applicant (appellant) have not been terminated till today and the applicant (appellant) is in service."

After noting the above fact, the Tribunal further observed as under :-

> "As there is word against word at this stage without accepting or rejecting the case of the applicant or the case of the management and leaving this issue for being considered finally, in the light of the oral as well as documentary evidence that might be adduced at the relevant time and without prejudice to the rights and contentions of both the parties, with a view to overcome (sic. arrive at) the settlement in the interest of justice the following order is passed.
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> 5. By way of interim order, the respondent school is directed to send the proposal of the applicant for being declared surplus to the C.H.R. alongwith all their relevant papers and information within a period of 2 weeks from today. On receipt of such a proposal, the C.H.R. may pass appropriate order as early as possible preferably within a period of 45 days."

2.3 Accordingly, the matter went to the Commissioner of Higher Education for consideration of the question whether the appellant was required to be declared as surplus or not. There is no dispute about the fact that in the meantime, the other teachers who were also serving as teachers in the vocational stream of respondent No. 1-school were declared surplus on 29.4.1993. However, the Commissioner of Higher Education expressed the view that the appellant himself had written letter dated

25.2.1992 to the school management expressing regret for his absence from the school (from August, 1991) and that in view of such absence, the appellant was required to be treated as having abandoned the service and, therefore, the appellant was declared to have been relieved from service on his own. That order dated 24.1.1997 (Annexure "E" to the petition) also came to be challenged before the Tribunal by filing Application No. 21 of 1997. Both the applications came to be heard and decided by the Tribunal by its order dated 1.6.1998 (Annexure "H" to the petition). The Tribunal also took the view that the appellant had remained absent from duty and the appellant had abandoned the service and, therefore, the Commissioner of Higher Education was justified in passing the order dated 24.1.1997 and in not declaring the appellant as a surplus teacher.

2.4 The appellant challenged the aforesaid orders before this Court by filing present petition i.e. Special Civil Application No. 5623 of 1999. The learned Single Judge, after noting that it was admitted that the management had not terminated the services of the appellant, referred to the aforesaid proceedings and held that the question whether the appellant had voluntarily left the service or whether his services were terminated was a relevant question to be considered and further noted that it was admitted by both the parties that five years' service was requisite before the person could be declared surplus. The learned Single Judge further observed that if the appellant had voluntarily left his service in 1991, he did not fulfill the criteria of completion of five years' service and, therefore, in view of the finding, given by the Commissioner as well as the Tribunal, that the appellant had abandoned his service in 1991, the appellant was not eligible to be declared as a surplus teacher. In view of this finding, the learned Single Judge dismissed the petition by the judgment dated 4.11.1999 which is under challenge in this appeal.

3. At the hearing of this appeal, Mr PK Jani, learned counsel for the appellant-original petitioner has made the following submissions :-

(i) The school management had never passed any order terminating the appellant's services. In fact, the school management had issued a charge-sheet on 25.5.1995 (Annexure "J" to the petition) which implied that the school management was treating the appellant as continuing in employment. If the appellant was not in employment of the school, the question of issuing such a

charge-sheet would not have arisen. The fact that the school management had not passed any order terminating the appellant's services was also an admitted fact before the Tribunal as recorded in its interim order dated 23.7.1996.

(ii) In view of the above factual aspect, the Commissioner of Higher Education was not required to go beyond the interim order dated 23.7.1996 of the Tribunal and was only required to consider whether the appellant was entitled to be declared as a surplus teacher like the other teachers in the vocational stream of respondent No.1-school who were declared surplus on 29.4.1993. Hence, the finding given by the Commissioner of Higher Education that the appellant had abandoned his service and that his services were required to be brought to an end was without authority and ought to have been set aside by the Tribunal.

(iii) The learned Single Judge has erred in observing that it was admitted by both the parties that five years' service was requisite before a person could be declared as a surplus teacher. When the case of the other teachers was considered in April 1993, the relevant and applicable Government Resolution was Government Resolution dated 8.7.1991. As per the said resolution, if a school had not completed three years of its existence, it was not permitted to submit any proposal for declaring its teachers as surplus. Admittedly, respondent No.1-school in its vocational stream had completed three years of its existence in July, 1991 and, therefore, the other teachers in the vocational stream classes of respondent No.1-school were declared surplus on 29.4.1993. The appellant had not put in lesser service than the other teachers and, therefore, the appellant could not have been discriminated against in the matter of declaration of surplus teachers.

4. On the other hand, the appeal has been opposed by Mr Premal Joshi, learned AGP for the authorities being Commissioner of Higher Education, District Education Officer, Ahmedabad and the State of Gujarat in the Education Department. Ms Sejal Sutharia for Mr VH Desai, learned counsel for respondent No. 1-school management has also opposed the appeal.

5. The learned counsel for the respondents have

supported the order of the learned Single Judge, but the learned counsel for the respondents have also fairly agreed that there was no resolution requiring a teacher to put in five years' service before he could be declared surplus, but the Government Resolution dated 21.5.1994 provided that a school which is closed down within five years of its commencement cannot send the proposal for declaration of its teachers as surplus. Respondent No. 1 school was established earlier, but had commenced vocational classes in June, 1988. In view of the above position, we have proceeded on the basis that a teacher was required to put in one year service before being eligible to be declared as surplus. Since the case of the other teachers in respondent No.1-school for being declared as surplus was considered and granted on 29.4.1993, we have applied the Government Resolution dated 8.5.1991, according to which a school was required to have completed three years of its existence before its teachers could be considered eligible for being declared as surplus teachers. The respondent-school did fulfil this criterion.

6. The only question which now remains for our consideration is whether the Commissioner of Higher Education, the Tribunal and the learned Single Judge were justified in holding that the appellant had abandoned his service and was, therefore, not entitled to be considered for being declared as a surplus teacher.

7. Before considering this question, it is necessary to refer to the admitted fact that the school management had never passed any order terminating the appellant's services at any point of time. In fact, in May, 1995 the school management had issued a charge-sheet calling upon the appellant to show cause why he should not be dismissed from service on the ground of continued absence. Such a charge-sheet would not have been issued to the appellant if the appellant was not treated as continuing in employment of respondent No.1-school. It is not possible to accept the reasoning given by the learned Single Judge that initiation of inquiry by the employer during pendency of the application in which question was live in the circumstances, could only be taken as a cautious alternative adopted by the employer in case the finding of the Tribunal goes against it. In fact, the entire controversy about the alleged absence of the appellant from 26.2.1992 onwards was not decided by any inquiry. The absence of the appellant from July, 1991 to 25.2.1992 was admitted, but the real controversy was about the alleged absence for the period from 26.2.1993 onwards. All the letters which were written by

the school management and the appellant which were considered by the Commissioner of Higher Education and the Tribunal were for the period upto 25.2.1992. In absence of any such letter of the appellant or the school management after 25.2.1992 indicating the absence of the appellant, the Commissioner and the Tribunal were not justified in coming to the conclusion that the appellant had abandoned service.

8. In any view of the matter, in view of the admitted fact that the school management had not passed any order either terminating the appellant's services or treating the appellant as having ceased to be an employee of the respondent-school management, the Commissioner and the Tribunal were not justified in treating as if the appellant's services had already come to an end before 29.4.1993 when the other teachers in vocational stream of the respondent-school were declared surplus. In this view of the matter and in view of the fact that the appellant was similarly situate as the other teachers of the respondent-school in its vocational stream who were declared surplus on 29.4.1993, there was no justification for the Commissioner in not declaring the appellant as a surplus teacher with effect from that date.

9. In view of the above discussion, the impugned orders of the Commissioner of Higher Education, the Tribunal and the learned Single Judge will have to be set aside and the respondents, particularly respondent No. 2, will have to be directed to declare the appellant as a surplus teacher with effect from 29.4.1993 when the other teachers of respondent No.1-school in vocational stream were declared as surplus.

10. At this stage, the learned AGP has submitted that granting any such relief in favour of the appellant would cast heavy financial liability on the authorities.

In view of the above submission, we make it clear that though we are directing the respondent authorities to declare the appellant as a surplus teacher with effect from 29.4.1993 when the other teachers of respondent No.1-school in vocational stream were declared as surplus, the appellant will not be entitled to get the benefit of any arrears of salary or any other actual monetary benefit till today, but the respondent authorities, particularly respondent No. 2, shall pass an order declaring the appellant as a surplus teacher with effect from 29.4.1993 and allot him to any other school where the appellant could be allotted either in

vocational stream or in general stream depending on the availability of vacancies in accordance with the relevant rules.

11. In the result, the appeal is allowed. The order dated 24.1.1997 (Annexure "E" to the petition) of the Commissioner of Higher Education, the order dated 16.6.1998 of the Tribunal and the judgment and order dated 4.11.1999 of the learned Single Judge are quashed and set aside. Respondent No. 2 is directed to declare the appellant as a surplus teacher with effect from 29.4.1993. However, the appellant shall not be entitled to get any arrears of salary or any actual monetary benefit for the period upto 31.7.2003. However, the appellant shall be considered as surplus for other purposes with effect from 29.4.2003. By 31.7.2003 respondent No. 2 shall issue an order declaring the appellant as surplus teacher and shall thereafter allot the appellant to any other school in vocational stream or in general stream in accordance with the Government Rules and instructions in this behalf as expeditiously as possible and preferably by 30th September, 2003. The appellant shall, however, be given the actual benefits of the declaration as a surplus teacher from 1st August, 2003.

There shall be no order as to costs.

(KSHITIJ R. VYAS, J.)

(M.S. SHAH, J.)

sundar/-